

January 30, 2007

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: William J. Lueckel, Jr.

Date of Filing: December 7, 2006

Case Number: TFA-0182

On December 7, 2006, William J. Lueckel, Jr., filed an appeal from a determination issued to him on November 2, 2006 by the Department of Energy's (DOE) Golden Field Office (Golden). In that determination, Golden responded to a request for documents that Dr. Lueckel submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This appeal, if granted, would require Golden to release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

On October 26, 2006, Dr. Lueckel filed a request with Golden for "a copy of the non-proprietary Summary/Abstract of each of the proposals submitted to DOE in response to topics 2, 3, and 4" of a Financial Assistance Funding Opportunity Announcement (FOA) issued on January 24, 2006. Electronic Mail from Dr. Lueckel to Golden (October 26, 2006). On November 2, 2006, Golden responded to Dr. Lueckel's request, stating in pertinent part,

We are unable to provide you with the information responsive to your FOIA request Please be advised that under the FOIA, DOE only releases information related to applications that receive an award. DOE's protection of FOA proposals is justified under FOIA Exemption 5, which covers documents that contain pre-decisional information regarding the deliberative processes of the government, and FOIA Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."

Letter from Golden to Dr. Lueckel (November 2, 2006).

Dr. Lueckel then filed the present appeal. In the appeal, addressing Golden's stated rationale for the application of Exemption 4, he notes that the FOA in question states with regard to summary/abstracts, "This document must not include any proprietary or sensitive business information as the Department may make it available to the public." Appeal at 1-2; Financial Assistance Funding Opportunity Announcement, Research and Development of Fuel Cell Technology for the Hydrogen Economy, Funding Opportunity Number: DE-PS36-06GO96017 (January 24, 2006) [hereinafter January 24 FOA].

On January 10, 2007, Golden submitted a response to Dr. Lueckel's appeal. In its response, Golden states, "Because the summary/abstracts are not supposed to contain confidential commercial or financial information, DOE is at this time withdrawing its reliance on Exemption 4 as a basis for withholding the summary/abstracts." Letter from Kimberly J. Graber, Legal Counsel, Golden, to Steven J. Goering, Office of Hearings and Appeals (January 9, 2007) [hereinafter Golden Response].¹ The issue before us, then, is whether the summary/abstracts submitted in response to the FOA may be withheld under either FOIA Exemption 5.

II. Analysis

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). "[T]he first condition of Exemption 5 is no less important than the second; the communication must be 'inter-agency or intra-agency.' 5 U.S.C. § 552(b)(5)." *Klamath*, 532 U.S. at 9.

Because we find, as explained below, that the summary/abstracts are not inter-agency or intra-agency communications, they may not be withheld under FOIA Exemption 5. Golden cites a previous decision of our office in which we stated that "[w]hen documents have been created outside of an agency but pursuant to agency initiative, courts have held that such documents are intra-agency documents' for purposes of FOIA Exemption 5." Golden Response at 5 (quoting *William H. Payne*, 26 DOE ¶ 80,161 (1997) (citing *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971))). However, subsequent to our 1997 decision in *Payne*, in 2001 the Supreme Court issued its decision in *Klamath*, cited above, and the holding of the Court in that case does not support Golden's withholding of the documents at issue.

In *Klamath*, the Court considered the application of Exemption 5 to communications between the Bureau of Indian Affairs and certain Indian tribes. *Klamath*, 532 U.S. at 6. The Court noted that some lower courts had "held that the exemption extends to communications between Government agencies and outside consultants hired by them." *Id.* at 10. Assuming, without deciding, that such communications qualify as intra-agency under Exemption 5, the Court found that the "intra-agency condition . . . rules out application of Exemption 5 to tribal communications on analogy to consultants' reports." *Id.* at 12. The Court reasoned

¹ Golden also states in its response that it believes the documents may be withheld under FOIA Exemption 3, though it did not cite this exemption in its original determination in response to Dr. Lueckel's request. Golden Response at 3-4. Because, as explained below, we are remanding this case to Golden for a new determination, Golden will have an opportunity to set forth in that determination its basis for any withholding under FOIA Exemption 3.

[C]onsultants whose communications have typically been held exempt have not been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant. In that regard, consultants may be enough like the agency's own personnel to justify calling their communications "intra-agency." The Tribes, on the contrary, necessarily communicate with the Bureau with their own, albeit entirely legitimate, interests in mind. While this fact alone distinguishes tribal communications from the consultants' examples recognized by several Courts of Appeals, the distinction is even sharper, in that the Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone.

Id. Thus, "the intra-agency condition excludes, at the least, communications to or from an interested party seeking a Government benefit at the expense of other applicants." *Id.* at 12 n.4.

The distinction drawn by the Court in *Klamath* could hardly be more applicable here. The documents at issue in this case were not submitted by consultants that "had not been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant." *Id.* at 12. Instead, the summary/abstracts provided in response to the FOA were submitted by "interested part[ies] seeking a Government benefit at the expense of other applicants." *Id.* Applying the holding of the Court in *Klamath* to the present case, the summary/abstracts may not be withheld under Exemption 5.

III. Conclusion

Because we disagree with Golden as to the application of FOIA Exemption 5 to the documents requested by Dr. Lueckel, we will remand this matter to Golden for the issuance of a new determination either releasing those documents or providing a justification for their withholding that is consistent with the analysis set forth above.²

It Is Therefore Ordered That:

- (1) The Appeal filed on December 7, 2007 by William J. Lueckel, Jr., OHA Case No. TFA-0182, is hereby granted as set forth in Paragraph (2) below and is denied in all other respects.
- (2) This matter is hereby remanded to the Department of Energy's Golden Field Office for the issuance of a new determination in accordance with the instructions set forth above.

² Golden notes in its response, and we agree, that the DOE FOIA regulations require Golden to "consider the submitter's views . . . in making its determination." Golden Response at 1; 10 C.F.R. § 1004.11.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Office of Hearings and Appeals

Date: January 30, 2007